



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 18, 2015

PR 15-19

Kendra L. Beaver, Esquire

Re: Save the Bay v. Department of Environmental Management

Dear Attorney Beaver:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the Department of Environmental Management ("DEM") is complete. By email correspondence dated September 24, 2014, you alleged the DEM violated the APRA when it improperly denied your APRA request dated August 15, 2014. You further alleged that the DEM does not have a copy of its written APRA procedures on its website in violation of R.I. Gen. Laws § 38-2-3(d).

It appears on August 15, 2014, you sought a copy of the DEM's Office of Compliance and Inspection Access to Public Records Guidance ('Public Record Guidance').¹ On August 26, 2014, you received an email from DEM's executive counsel that the document was prepared within a client/attorney relationship, and therefore, not deemed public pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).

In response to your complaint, we received a substantive response in affidavit form from DEM's executive counsel, Mary E. Kay, Esquire. Attorney Kay states, in pertinent part:

"The basis for DEM's denial of STB's [Save the Bay] public records request is that the requested document was prepared by DEM's Office of Legal Services ('OLS') to provide legal advice and assistance to DEM's Office of Compliance and Inspection ('OC&I') in responding to public records requests. Such attorney/client communications are not defined as public records pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).

¹ We question whether your email to an employee at DEM constituted a proper APRA request pursuant to DEM's APRA procedures. Since DEM does not raise this issue, we continue with our analysis.

As the Attorney General is aware, in 2012 the General Assembly made substantive changes to the [APRA]. One of the new requirements of the Act was a requirement for orientation and training for 'all officers and employees who have the authority to grant or deny persons or entities access to records.' * * * In response to the changes to the statute the DEM, with the assistance of the Attorney General began an intensive training program. The purposes of this program were to inform DEM staff, who respond to records requests, of the changes to the Act and to ensure compliance with the new requirement regarding training. The Attorney General's Office conducted such a training session at DEM on September 12, 2012. Following that training, several DEM offices, including DEM's OC&I requested additional legal advice from OLS relating to responding to public records. Accordingly, OLS held follow up training for several DEM offices and divisions, including OC&I, to provide legal advice tailored to the specific office and divisions. The document STB has been denied access to is the Office of Compliance and Inspection's Public Records Guidance Document (the 'Guidance Document') which was prepared by OLS to provide OC&I legal advice relating to legal questions raised by OC&I.

The Guidance Document was prepared within the client/attorney relationship and, thus, pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) it is explicitly excluded from the statutory definition of a public record for purposes of the Act. The DEM offices and divisions frequently request legal advice from the OLS. The legal advice rendered, as in this instance, the legal obligations of the OC&I in responding to requests received pursuant to the Act, clearly falls within the definition of the 'client/attorney relationship.'

As such, the Guidance Document is not defined as a 'public record' pursuant to R.I. Gen. Laws § 38-2-2(4)(A)(I)(a) which provides as follows: (emphasis in original)

[']For the purposes of this chapter, the following records shall not be deemed public:

(A)(I)(a) All records relating to a client/attorney relationship and to a doctor/patient relationship, including all medical information relating to an individual in any files.[']

As such, the requested document is not available to STB pursuant to the Act.

* * *

Finally, [with respect to the allegation] that DEM does not have a copy of its written APRA procedures on its website in violation of R.I. Gen. Laws § 38-2-3(d). * * * The website procedures regarding file reviews * * * was updated at the

time of the DEM training described above and has been on the DEM website at all times since the update, which was made in late 2012.”

We acknowledge your rebuttal dated October 23, 2014.²

In examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the DEM violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA states that all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). The APRA, however, does exempt some documents from public disclosure and among the exemptions set forth in the APRA is “[a]ll records relating to a client/attorney relationship.” R.I. Gen. Laws § 38-2-2(4)(A)(I)(a).

In this case, we have been provided with a copy of the Guidance Policy to review. Although our in camera review prevents our full discussion of the document in issue, it suffices that this three (3) page document was prepared by DEM legal counsel to assist staff of the DEM’s Office of Compliance and Inspection with complying with the APRA.

“The general rule is that communications made by a client to his attorney for the purposes of seeking professional advice, as well as the responses by the attorney to such inquiries, are privileged communications not subject to disclosure.” State v. Von Bulow, 475 A.2d 995, 1004 (R.I. 1984). See also Hickman v. Taylor, 329 U.S. 510-11 (1947)(“In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”).

In order for the attorney-client privilege to apply, the following elements must be satisfied:

“(1) the asserted holder of the privilege is or sought to become a client; (2) the person to who the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a

² In your rebuttal you raise allegations and issues that were not raised in your initial complaint. Respectfully, these new allegations and issues will not be addressed in this finding. As was stated in this Department’s acknowledgment letter to you dated October 3, 2014, “you may have one opportunity to rebut DEM’s response. Your rebuttal should be limited to the matters addressed in DEM’s response and should not raise new issues that were not presented in your complaint or addressed in DEM’s response.”

lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” Callahan v. Nystedt, 641 A.2d 58, 61 (R.I. 1994).

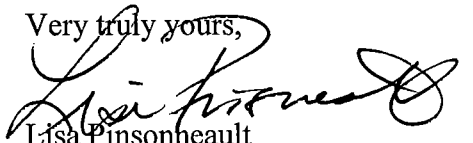
Based upon the above exemption, as well as the case law from the Rhode Island and United States Supreme Courts, we must conclude that the document you have requested, which was created by DEM’s legal counsel and sent to various DEM employees relative to their legal inquiries is exempt from public disclosure. See R.I. Gen. Laws § 38-2-2(4)(i)(E). See also R.I. Gen. Laws § 38-2-2(4)(i)(A)(I)(exempting “all records relating to a client/attorney relationship”). Our in camera review of this document reveals that this document represents legal counsel’s analysis concerning various exemptions and public records involving the DEM. Respectfully, even your September 24, 2014 APRA complaint seems to acknowledge that “[t]he requested document [was] prepared with advice of counsel.” The fact that this document did not pertain to a “specific case” before DEM is of no moment and you provide no authority to support your argument that a document that falls within the attorney/client privilege is considered a “rule” under the Administrative Procedures Act that must be disclosed. See R.I. Gen. Laws § 42-35-1(8). Accordingly, for the reasons discussed, we conclude the requested document is exempt from disclosure by the attorney/client privilege.³

With respect to your allegation that the DEM’s APRA procedures were not on DEM’s website, Attorney Kay indicates that the DEM’s APRA procedures have been on its website since 2012, the year the requirement that APRA procedures be on a public body’s website, if maintained, went into effect. You present no evidence to dispute this assertion and our review finds ample evidence to support DEM’s position. See www.dem.ri.gov/topics/filerevw.htm. We therefore find no violation.

Nothing within the APRA prohibits an individual from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in the Superior Court.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,


Lisa Pinsonneault
Special Assistant Attorney General

Cc: Mary E. Kay, Esquire

³ The fact that this Department has determined the document is protected by the client/attorney privilege, there is no need to determine whether any portion of this document is segregable. See R.I. Gen. Laws § 38-2-3(b).